**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

AMERICAN SALES AND MANAGEMENT
ORGANIZATION, LLC d/b/a EULEN AMERICA

and

Cases 12-CA-163435
12-CA-176653

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 32BJ

# COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND RECOMMENDED ORDER

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## I. INTRODUCTION AND STATEMENT OF THE CASE

On January 30, 2018, Administrative Law Judge Ira Sandron ("ALJ Sandron" or "the ALJ") issued his Decision in this case, correctly finding that American Sales and Management Organization, LLC d/b/a Eulen America (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by discharging employee Joanne Alexandre (Alexandre) because she engaged in a strike led by Service Employees International Union, Local 32BJ (the Charging Party), and to discourage employees from engaging in union activities or otherwise sympathizing with the Charging Party. Respondent filed Exceptions and a supporting brief on March 20, 2018, challenging ALJ Sandron's well-reasoned conclusion that the Board may exercise jurisdiction over Respondent and that it is not excluded from the Act's definition of an "employer."[1] Pursuant to Section 102.46(d) of the Board's Rules and Regulations, Counsel for the General Counsel hereby submits this Answering Brief to Respondent's Exceptions.[2]

In short, Respondent, a national company which competes with similar entities to win contracts to provide ground support services to airlines, contends that because its contracts with six airlines at the Fort Lauderdale-Hollywood International Airport (FLL) include provisions explaining its scope of services and the client airlines' expectations of performance, it should be considered akin to the airlines themselves under the National Mediation Board (NMB) two-part "derivative carrier" test.[3] The reality of Respondent's operations at FLL stands in sharp contrast

[1] As Respondent has chosen not to except to any of the ALJ's findings or conclusions regarding the substance of the unfair labor practice allegation, this brief is limited to the facts regarding Respondent's operations at FLL and argumentation of the jurisdictional issue.

[2] Respondent's Exceptions to the Administrative Law Judge's Decision and Recommended Order, and its Brief in Support of Exceptions to the Administrative Law Judge's Decision and Recommended Order are referred to collectively herein as "Respondent's Exceptions." ALJ Sandron's Decision is referenced herein as ALJD (page:line). General Counsel's Exhibits are referenced as GCX (number); Respondent's Exhibits are referenced as RX (number); Charging Parties Exhibits are referenced as CPX (number). References to the Joint Stipulations, in evidence at JX 2, are noted as JS (paragraph). The hearing transcript is referenced as Tr. (page number).

[3] At FLL, Respondent contracts to provide varying types of support services to American Airlines (American), Bahamasair Holdings (Bahamas), Delta Airlines (Delta), JetBlue Airways Corporation (JetBlue), Spirit Airlines, Inc.

to prior cases where the NMB found sufficient "de facto" carrier control to find that such entities are employers subject to NMB jurisdiction under the Railway Labor Act (RLA); ALJ Sandron therefore correctly ruled that Respondent is an employer within the meaning of the Act, subject to the jurisdiction of the National Labor Relations Board (NLRB or the Board).

The bulk of Respondent's Exceptions allege that ALJ Sandron failed to report in his decision meticulous details from the voluminous record created by the four-day hearing in this matter, without showing that ALJ Sandron's summary of the facts in evidence is materially inaccurate or misrepresentative of Respondent's relationship with the carriers at FLL. The cornerstone of Respondent's substantive argument on the jurisdictional question is contractual language that ostensibly reserves an array of oversight rights to the carriers. However, as discussed below, the record as a whole reveals that the carriers did not exercise meaningful or routine oversight of either Respondent's business operations or its employees.

In fact, the record includes testimony from station managers of two of the six carriers Respondent has contracts with at FLL, demonstrating the exact opposite: that Respondent's business is Respondent's own, and the oversight performed by the carriers is limited to ensuring that the services which Respondent is contractually obliged to perform have been satisfactorily provided. Respondent also attempts to characterize the contracts as unilateral impositions upon its business by the carriers, with dictatorial terms constraining Respondent's business choices. The record shows rather that Respondent is an independent entity, making its own choices about both its business operations and personnel decisions. Respondent is not a derivative carrier of the airlines for which it performs services at FLL. For the reasons detailed below, Respondent's Exceptions should be denied except to the very limited extent noted in this brief.

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(Spirit), and West Jet. [JS 5-10; JX 6-17].

Additionally, since the record in this case presents clear evidence that Respondent is not a derivative carrier, referral to the NMB for an advisory opinion is unnecessary and would merely serve to delay justice for Alexandre, while forcing two federal agencies to expend their limited resources formally determining that Respondent's FLL employees and operations are not under the de facto control of the FLL carriers. Respondent's request for a referral of this case to the NMB should therefore be denied.

## II. ARGUMENT AND CITATION TO AUTHORITY

### A. Respondent's Exceptions are procedurally defective and should be disregarded *en masse*.

Section 102.46(a) of the Board's Rules and Regulations sets forth the requirements for an exceptions document and brief in support. Respondent's exceptions document is 39 pages that largely consist of factual statements culled from the extensive record in this case, masquerading as exceptions to ALJ Sandron's accurate and fair summations. Meanwhile, Respondent's supporting brief, a 40 page document, fails to identify particular exceptions in its argument as required, instead choosing to rehash its post-hearing brief to the ALJ. Rule 102.46(2)(ii) of the Board's Rules and Regulations. Respondent appears to have ignored the Board's Rules in an effort to circumvent the 50-page limit for briefs set forth in §102.46(h).

Specifically, Respondent's Exceptions 2 and 4 through 35 each set forth a statement from the ALJD, then critique the ALJ's "failure" to find either a more detailed version of that same statement as set forth in Respondent's post-hearing brief, or, in some cases, a puffed-up version of facts drawn from the testimony of Respondent's director at FLL, Yasmin Kendrick (Kendrick). For example, Respondent's Exception 34 objects to the following summary by ALJ Sandron: "[s]ome [airlines] also provide the cleaning solutions; for others, the responsibility is [Respondent's]," ALJD 8:32, because it does not also describe that those cabin cleaning supplies

include soaps and lotions used to supply the aircraft lavatories, and other carrier-specific cabin amenities, or procedural information about how Respondent communicates about reordering of supplies with Delta, one of two airlines that supplies such items. Such details are unnecessary to set forth in the ALJD, because it can be inferred from the summary that, if the carrier supplies the cleaning solutions and Respondent's job is to refresh the aircraft cabins between flights, the carriers also provide their branded cabin amenities and must be notified of when it is time to reorder. The supporting brief does not demonstrate that ALJ Sandron failed to consider those details in reaching his conclusion or that he erred by choosing not to include in his decision those excessive details sought by Respondent's Exceptions. For similar reasons, many of the facts set forth in the various subparts of Respondent's Exception 36 also do not change the outcome of this case.

Tellingly, Respondent makes only intermittent references to the ALJD or the theories underlying its exceptions in its supporting brief. For example, the word "extraneous" appears nowhere in Respondent's argument in its supporting brief, despite "extraneous as a matter of law" being the ostensible basis for five of Respondent's Exceptions (5, 6, 16, 18, and 30) to the ALJ's factual findings.[4] Likewise, from pages 28 through 30 of the supporting brief, there is no reference whatsoever to the ALJ's findings or conclusions, merely a recitation of the favorable facts set forth in the exceptions document. (Respondent appears to be erroneously operating on a theory that, rather than looking at the sum total of the parts of its relationships with the carriers at FLL to determine whether there is significant control, all it needs to do is add enough drops to fill a bucket representing carrier influence. As set forth more fully below, this is an incorrect interpretation of NMB and NLRB precedent on this issue.) Respondent has therefore failed to match its argument to its exceptions as required by the Board's Rules and Regulations, and has

[4] Nor does the supporting brief include: "unnecessary," "superfluous," "inessential," or "as a matter of law."

failed to demonstrate that the ALJ erred by failing to copy and paste large swaths of the record into his decision. Therefore, Exceptions 2 and 4 through 36 should be rejected, for these procedural reasons as well as those substantive reasons set forth below. For the same procedural defects, Respondent's entire supporting brief should be disregarded and stricken from the record.

### B. ALJ Sandron properly resolved credibility disputes between Kendrick's testimony and other record evidence. Respondent's Exceptions 2, 8, 9, 11, 12, 15(i), 17, 21, and several portions of 36 are without merit.

Respondent does not specifically except to any of the ALJ's credibility resolutions as such. However, many of its factual recitations in the exceptions document stand in opposition to certain of the ALJ's credibility resolutions against Kendrick, and therefore implicitly seek to have the Board overrule them. Specifically, Respondent's Exceptions 2, 8, 9, 11, 12, 15(i), 17, 21, and several subparts of 36 implicate the ALJ's well-founded credibility resolutions and do not articulate any basis for reversing them. They must therefore be rejected.

The Board's established policy is not to overrule an ALJ's credibility resolutions unless the clear preponderance of all the relevant evidence convincingly demonstrates that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). In making credibility determinations, administrative law judges may rely on a number of factors, including "the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole." *Hills & Dales General Hospital,* 360 NLRB 611, 615 (2014). The Board has cited with approval an ALJ's discrediting of current employees who testify on behalf of the employer, reasonably inferring that the employee may be reluctant "to incur the Respondent's disfavor." *Classic Sofa, Inc.,* 346 NLRB 219, 220 at n. 2 (2006). A trier of fact may also draw the "strongest possible adverse inference" against a party that fails to present a material witness or tangible evidence within the party's control, that would

otherwise be presumed to be favorable to it. *Flexsteel Industries, Inc.*, 316 NLRB 745 (1995); *Douglas Aircraft Company*, 308 NLRB 1217, 1217 fn. 1 (1992); *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977) ; *Southern Pride Catfish*, 331 NLRB 618 (2000); *Seafarers (American Barge Lines)*, 244 NLRB 641 (1979).

The witness testimony offered by neutral third-party witnesses, American station manager Gayle Defrancesco (Defrancesco) and Spirit operations manager William Rose (Rose), was forthright, consistent, and logical. Importantly, Defrancesco's testimony highlighted the differences between the ostensible rigidity of the relationship between Respondent and American portrayed in the contract and the practical reality of relatively sporadic, informal communications between American staff and Respondent's employees, supervisors and managers, including Kendrick. [E.g., Tr. 288-290, 299-304]. For example, for the ALJ appropriately exercised his discretion by omitting from his decision any reference to Kendrick's statement that "[a]n airline staff can ask one of our employees have you seen the crew pass by" as evidence of direct communication, supervision, or direction by the carriers. [Tr. 576]. Defrancesco stated that it would be abnormal for American staff to speak to Respondent's employees and ask them to do something. [Tr. 289]. Even if the ALJ did not discredit Kendrick on this point, such an innocuous question, which simply asks that an employee relate his or her observations and contains no instruction or direction, is inconsequential in the carrier control analysis.

The ALJ also properly credited Rose regarding both the collaborative process leading to the creation of the dispatcher position for Respondent's Spirit account, and the unilateral decision of Respondent to remove the night-shift dispatcher from the Spirit account. With regard to the removal of the night-shift dispatcher, Rose testified that he sent a series of emails to

Kendrick setting forth details about the timing of Respondent's turn cabin cleaners' arrival and departure from Spirit's aircraft and flight delays. [Tr. 223-224]. Kendrick testified that Rose instructed Respondent to remove the night-dispatcher from the account. [Tr. 538-539]. However, Rose credibly testified that he did not ask Respondent to take any specific action with respect to the dispatcher, who was the common denominator to all those delayed flights, and did not request her removal from the account. [Tr. 225]. Respondent's failure to produce the emails from Rose permits a strong inference that in fact, Respondent was not asked to remove the employee to remedy the situation, but rather determined on its own that that was the most expedient solution to the problem identified. The ALJ therefore correctly concluded that Kendrick's self-serving testimony that removal was expressly sought by Spirit should be discredited.

Accordingly, Respondent's Exceptions 2, 8, 9, 11, 12, 15(i), 17, 21, and 36(lxi)-(lxvi) should be rejected as being without merit. The Board should uphold the ALJ's credibility resolutions and corresponding findings of fact and conclusions of law.

### C. ALJ Sandron correctly concluded that exercise of Board jurisdiction over Respondent is appropriate.

#### *i. Relevant NMB and NLRB Precedent*

The NLRA exempts from Board jurisdiction employers subject to the Railway Labor Act, 45 U.S.C. § 151 et seq. The Board follows NMB precedent to decide this jurisdictional question if it is raised by the employer, and the Board may determine that it is unnecessary to refer the issue to the NMB for an advisory opinion where the facts are similar to those where the NMB has previously declined jurisdiction. *E.W. Wiggins Airways*, 210 NLRB 996 (1974); *Air California*, 170 NLRB 18 (1968).

The NMB has established a two-part test to determine whether an employer that is not itself a "carrier" within the meaning of the RLA is sufficiently controlled by a carrier to be subject to its jurisdiction, commonly referred to as a "derivative carrier." *Swissport USA, Inc.*, 35 NMB 190, 194-195 (2008); *Air Serv Corp.*, 33 NMB 272, 285 (2006). The NMB test requires two affirmative findings: (1) that "the nature of the work is that traditionally performed by employees of rail or air carriers," and (2) that "the employer is directly or indirectly owned or controlled by, or under common control with a carrier or carriers." *Signature Flight Support of Nevada*, 30 NMB 392, 399 (2003). In determining whether the employer is sufficiently under the control of the rail or air carrier, the NMB considers the following six factors:

> (1) the extent of the carrier's control over the manner in which the company [an alleged derivative carrier] conducts its business; (2) the carrier's access to the company's operations and records; (3) the carrier's role in the company's personnel decisions; (4) the degree of carrier supervision of the company's employees; (5) whether company employees are held out to the public as carrier employees; and (6) the extent of the carrier's control over employee training.

*Air Serv Corp*, 33 NMB at 285. This fact-intensive inquiry is performed on a location by location and contract by contract basis, "because contracts and local practices might vary in a determinative manner for different employee groups, different operations, and in different locations." *Air Serv Corp.*, 39 NMB 450, 455-456 (2012).[5] It is "the degree of influence that a carrier has over discharge, discipline, wages, working conditions, and operations," that must be

[5] Thus, the NMB has, when circumstances warrant, declined to exercise jurisdiction over an employer who performs services under a different contract at another location than one where it previously found sufficient carrier control to extend jurisdiction to the contractor. See, e.g., *Air Serv Corp.*, 39 NMB 450 (2012) (declining to exert jurisdiction regarding Air Serv operations at LaGuardia Airport, having previously found sufficient carrier control in Air Serv operations at San Francisco International Airport, *Air Serv Corp.*, 33 NMB 272 (2006), and at John F. Kennedy International Airport, *Air Serv Corp.*, 38 NMB 113 (2011)); *Menzies Aviation, Inc.*, 42 NMB 1, 6 (2014) (declining to exert jurisdiction regarding Menzies Aviation operations at Seattle-Tacoma International Airport, having previously found sufficient carrier control in Menzies Aviation operations at Los Angeles International Airport, *John Menzies*, 30 NMB 463 (2003)). Neither the NLRB nor the NMB has ever decided a case involving jurisdiction over Respondent, although the NLRB has ruled in the General Counsel's favor, without passing on the question of jurisdiction, on two of Respondent's petitions to revoke investigative subpoenas *duces tecum*, including one issued in the course of the investigation of the instant case.

shown before derivative carrier status may be found. *ABM Onsite Services-West, Inc. v. NLRB*, 849 F.3d 1137 (D.C. Cir. 2017), citing *Air Serv Corp.*, 33 NMB at 285.

The NLRB recently referred *ABM-Onsite Services* to the NMB for an advisory opinion on jurisdiction; the NMB issued its advice on February 26, 2018, nearly one month after ALJ Sandron's decision issued. 45 NMB 27 (2018). Although Respondent is correct that the NMB declined in *ABM-Onsite Services* to emphasize any one factor of its six-part inquiry over any other, the core principle that the "air carrier must effectively exert a significant degree of influence over the company's daily operations and its employees' performance of services in order to establish RLA jurisdiction" remains good law. *Id.* at 34-35.

Applying this standard, the NMB looked beyond the contract between ABM and the Portland Airline Consortium (PAC) for ABM's baggage handling services at the Portland Airport (PDX), to the actual exertion of control by the PAC over the baggage handling operation and ABM's personnel. The PAC's General Manager (GM) and ABM's Facilities Manager at PDX had adjacent offices and frequent communications throughout the day; the PAC GM even set the Facilities Manager's schedule to match his, issued directions to her, and facilitated her promotion to that position. *Id.* at 28-30. ABM and PAC not only agreed to a "cost-plus" contract, they engaged in an annual budget negotiation entailing review and negotiation of overall labor costs, including wages, health and welfare costs, and 401(k) contributions. *Id.* at 32. ABM had to obtain approval from the PAC GM to implement wage increases for its employees. *Id.* at 32. ABM employees wore uniforms that displayed the PAC logo but were provided by ABM, while PAC reimbursed ABM for the costs of providing its employees with black pants and work boots. *Id.* at 31. ABM submitted monthly invoices to PAC showing the

number of hours worked and pay for each ABM employee each day, each employee's total health and welfare expenses, and other equipment and supplies costs. *Id.* at 33.

Beyond the general impact of the airlines' flight schedules on ABM's employee schedules, the ABM Facilities Manager periodically sought and obtained approval for proposed schedule changes from the PAC GM; however, during one holiday peak season, PAC denied ABM's request for additional labor. *Id.* at 32. At one point, the PAC GM determined that ABM should convert four supervisors from hourly to salaried employees, and eliminate a fifth, vacant supervisor position. *Id.* at 30.

At another time, in response to service issues, ABM retrained its employees at the request of the airlines and the PAC GM; the PAC GM was personally involved in the scheduling of ABM's employees and determining the costs for the retraining. The PAC GM created an "operations manual outlining procedures for 30 separate aspects of the [baggage handling] system" used by ABM's employees, and individual airlines sometimes added further instructions for their airline-specific procedures. *Id.* at 31-32. One portion of the regular three-week training program for ABM employees was also conducted by the PAC GM, and the PAC GM had to review all training materials prior to ABM furnishing them to employees. *Id.* at 33-34.

On at least two occasions, PAC exercised its contractual right to direct ABM to remove specific personnel from its service. In one instance, the PAC GM and United Airlines requested ABM to "take action" following an altercation involving an ABM employee, and ABM terminated the employee. *Id.* at 33. At another time, ABM investigated some kind of incident that was grounds for termination, and the PAC GM directed that ABM conduct additional investigation prior to approving the discharges. *Id.* at 33. Additionally, as a matter of routine, the PAC GM personally checked in with dispatchers, who were ABM employees, throughout the

day, and once requested that a particular dispatcher be moved to a less busy shift until his performance improved. *Id.* at 29, 33. On the basis of all these factors, the NMB determined that the PAC exerted sufficient effective control over ABM to warrant a finding of derivative carrier status.

Previous NMB cases provide further guidance as to how the six factors are examined in practice. In *Kanonn Serv. Enterprises Corp.*, 31 NMB 409 (2004), the NMB examined the relationship of Kanonn and Delta at FLL. At that time, Kanonn performed Delta's skycap and wheelchair assistance services, employing about 70 individuals, and had no other clients at FLL. *Id.* at 410. The NMB found it compelling that Delta not only dictated to Kanonn how many employees would work each shift and at which locations throughout the airport, but also the maximum number of hours which any individual employee could work per month, an item specified in the service contract. *Id.* at 414. Kanonn merely retained discretion as to which employees would fill the Delta-scheduled shifts. *Id.* at 414. Delta managers met with Kanonn's front-line supervisors at least twice per week, and with Kanonn's general manager daily to discuss employee performance. *Id.* at 414-415. Delta also established the training that Kanonn employees received upon hire from Delta employees, and required annual recertification of that training, the records of which were required by contract to be maintained by Kanonn. *Id.* at 415. While Kanonn's employees wore Kanonn uniforms, the NMB noted the grooming and appearance standards in Kanonn's contract with Delta and placed weight on the fact that Delta furnished Kanonn with its sole FLL office space and the equipment used by the skycaps and wheelchair assistants. *Id.* at 415. The NMB concluded that based on these facts, Delta had substantial control over Kanonn's FLL operations and personnel and that Kanonn therefore would be considered a derivative carrier under the RLA. *Id.* at 416-418.

In contrast, in *Signature Flight Support*, 32 NMB 214 (2005), the NMB examined the operations of Signature Flight Support at Westchester County Airport, a facility in White Plains, New York, serving mostly corporate-owned, privately-owned, and fractionally-owned aircraft. At the time, approximately 60% of Signature's White Plains business was with a company called NetJets, 20% with a company called TAG Aviation, and the remaining 20% apparently was directly with other private owner-operators. *Id.* at 217. The NMB determined that record evidence was sufficient to establish that NetJets was a carrier within the meaning of the RLA, and proceeded to analyze the extent of control which NetJets exerted over Signature's operations and employees in White Plains.[6] The NMB balanced all of the factors and determined that NetJets did not exert sufficient control over Signature, and that Signature was therefore not a derivative carrier.

The NMB noted Signature's maintenance of its own employee manual, safety manual, and customer service manual, as well as the fact that employees wore uniforms and identification cards bearing only Signature's name. Signature's employees received their on-the-job training exclusively from other Signature employees. The NMB acknowledged that although Signature employees' schedules were, broadly speaking, dictated by NetJets' flight schedule that was updated several times daily, Signature managers retained the final decision over how many employees to schedule at which times, and had sole discretion over whether to authorize overtime. A NetJets coordinator gave daily reports to Signature's operations manager regarding the day's needs, schedule changes, and Signature's performance. The NetJets coordinator also met at least weekly with Signature's on-site general manager to discuss staffing levels, the professionalism of Signature's employees, and the availability of necessary equipment, furnished

[6] The NMB did not pass on whether TAG Aviation was also a carrier, finding insufficient evidence on the question in the record.

by Signature. NetJets performed a maximum of two formal performance audits each year, and the NetJets coordinator would also report Signature performance problems to NetJets' corporate headquarters.

Furthermore, the NMB considered evidence that Signature employees sometimes received orders directly from NetJets employees, such as requests to help with baggage or obtaining food and drink, received instructions several times per day from Signature supervisors specific to the needs of particular flights communicated from NetJets via logistics report updates, and that at least one NetJets flight crew member was present at all times when Signature mechanics fueled aircraft or performed oil maintenance, even though Signature owned the equipment. Signature had also responded to NetJets' concerns about particular employees by transferring them. Nonetheless, the NMB emphasized that the totality of the evidence demonstrated that NetJets lacked the requisite substantial control over Signature's employees. Signature alone hired, trained, promoted, paid, transferred, evaluated, rewarded, and disciplined its workforce, even though it sometimes received feedback from NetJets that influenced such decisions.

The NMB contrasted these circumstances with those of four other cases where it had found derivative carrier status, including two prior cases involving other Signature locations. In those instances, the NMB found several factors taken together, impacting both the employer's operations and their employees, demonstrated substantial control by the carrier. For example, in *Signature Flight Support of Nevada*, 30 NMB 392, 400-401 (2003), the carriers not only required Signature's employees in Las Vegas, Nevada to follow their operating and training programs, the carriers also directed and supervised Signature employees, effectively recommending discipline when reporting personnel problems and participating in investigations of disciplinary incidents.

The carriers also had more extensive access to Signature's records in Las Vegas than NetJets did in White Plains; the carriers were able to access employees' background check files and training files. Signature also leased space from one of the carriers, something it did not do in White Plains. Finally, the NMB also noted that Las Vegas Signature employees were rewarded by the carriers with passes for free flights.

#### *ii. Respondent's FLL Operations Do Not Demonstrate the Requisite Carrier Control to Exempt it from Board Jurisdiction*

As described in detail above, the NMB and NLRB examine six factors to gauge the extent of control which carriers under the RLA exert over their contractors in order to determine whether those contractors are "derivative carriers" which also enjoy exemption, as RLA carriers do, from coverage under the NLRA. Respondent's Exceptions seek to conflate many of these factors, attempting to bolster its weak claim to derivative carrier status, while ignoring several crucial facts about its FLL operations that cut against finding derivative carrier status. The reality of Respondent's FLL operations reveal a significant *lack* of carrier control relative to other NMB cases where derivative carrier status was found, and more closely align with the facts presented in cases where the NMB declined jurisdiction even prior to the NMB's shift towards emphasizing personnel-related factors, which crystalized in *Bags, Inc.*, 40 NMB 165 (2013). The ALJ correctly analyzed the salient facts presented in this case and correctly determined that Board jurisdiction is appropriate in this matter. Although the ALJ did "note in particular the essentially nonexistent role that the airlines play in [Respondent's] hiring, disciplining, firing, directing or supervising [of] its employees," the decision is nonetheless clear that all six factors were considered and weighed together as a whole to determine that Respondent is not effectively controlled by the carriers at FLL. [ALJD 15:20-17:27]. Even upon a de novo review of the facts in evidence, applying the NMB's recent *ABM-Onsite Services* decision, 45 NMB 27 (2018), the

outcome of this case remains the same: Respondent is an "employer" within the meaning of the NLRA, not a "derivative carrier" within the meaning of the RLA.

*a.* *The ALJ Correctly Found that the Degree of Carriers' Control Over the Manner in Which Respondent Conducts Its Business is Insufficient. Respondent's Exceptions 8, 10, 34, 37-39, 41, 52, and various subparts of 36 are Without Merit.*

Despite Respondent's contention that its service agreements provide the best evidence that the carriers "dictate nearly all aspects" of its operations, the record is replete with contradictory evidence demonstrating that the contracts do not accurately reflect the situation on the ground at FLL. For example, although the American service agreement states that janitors will clean venetian blinds and the Admirals Club, American does not maintain either at FLL. [JX 7; Tr. 301-302]. The American contracts include fee rates for two employee classifications which Respondent has not employed to serve American at FLL in over six years, CTX Assist and Passenger Services Rep (gate agents), and an janitorial services audit form which has never been used by American station manager Defrancesco. [JX 7, 8; Tr. 295-296, 303-304]. The American contract also states that Respondent will use only 1.5 full time equivalents in performing its janitorial services, but Kendrick testified that about half of Respondent's 19-person janitorial staff works on the American account. [JX 8; Tr. 571]. Likewise, the Delta service agreement outlines procedures and duties of Sky Club matrons and bartenders, services not performed by Respondent at FLL.[7] [Tr. 560-561; JX 12, pages 1, 3].

The record is also devoid of any evidence of American exercising – or even requesting to exercise – its contractually retained right to approve in writing "material staffing changes," despite the potential access Respondent's janitorial employees may have to sensitive information while cleaning American's secure back offices. [Tr. 284]. Failure to utilize this contract right is

[7] Counsel for the General Counsel does not oppose Respondent's Exception 3, which seeks to correct the ALJ's inadvertent omission of other services provided to Delta at FLL.

a notable difference from *ABM-Onsite Services*, 45 NMB at 34-35 (2018), where the NMB emphasized the "effective exercise" of significant influence over mere authority on paper. In that case, the PAC GM both had significant input into the appointment of a new ABM facility manager, instructed ABM to cut costs by consolidating five hourly supervisors into four salaried positions, and actually approved all new hires made by ABM..

Therefore, although the service contracts include detailed descriptions of the cabin cleaning and janitorial services to be performed by Respondent's employees and the rights and obligations of the airlines and Respondent, the text of the service agreements do not accurately describe what Respondent's employees actually do day in and day out, nor of how the actual relationships between Respondent and its six airline clients operate in reality. Just as Kendrick's testimony inflated the extent to which the airlines control Respondent's business at FLL, so too do the contracts lose a significant amount of credibility on this issue in the face of contrary testimony by Defrancesco, Rose, and the other available evidence showing that they are little more than fee agreements. It is likely that the ALJ felt it was unnecessarily to describe or include the extensive recitation of contract terms sought by Respondent's Exceptions, and it was not error for him to fail to do so. Respondent's Exceptions 10, 36(i), 36(xxvi), 36(xliii), 36(xlvii), 36(liv), and 36(lx)-36(lxvi) are without merit.

The provision of supplies, equipment, and office and break room space by the airlines also holds less sway in this case than it did in earlier cases, where those items were supplied to the ground services contractor by their sole client, Delta for Kanonn and PAC for ABM. Respondent receives office and break room space from Delta in Terminal 2, a break room from West Jet in Terminal 1, and leases a third break room in Terminal 4 directly from BCAD.[8] [Tr.

[8] Although Kendrick testified that the West Jet office space is provided by West Jet, the West Jet contract is silent on that issue. [JX 17]. The only reference to procuring space in the contract is an agreement that Respondent

34-35, 45, 388, 504, 512; JS 18; JX 10, pages 15-16; JX 12, page 8]. Kendrick, the "liaison" for West Jet at FLL, only maintains a desk and filing cabinets in Respondent's Terminal 2 office, meaning that the managerial work she performs for West Jet and Respondent is performed in a space provided by Delta, in contravention of the Delta service agreement. [JX 10, pages 15-16]. This indicates a lack of control by both Delta and West Jet over Respondent's conduct of its business, despite Respondent's receipt of "free" space pursuant to its contracts. [JX 10, pages 15-16; Tr. 34-35, 496, 503-504].

In the same manner, the West Jet break room in Terminal 1 is also used by Respondent's employees working on the Bahamas account, as well as the JetBlue checkpoint agent on duty, since both of those airlines also operate out of Terminal 1 at FLL. [Tr. 35, 45, 495]. Because Respondent does not employ cabin cleaners dedicated to the West Jet or Bahamas accounts, those employees who primarily use either the Terminal 2 or Terminal 4 break rooms may pass through Respondent's space in Terminal 1 in order to retrieve the supplies needed to work on those flights. [Tr. 463, 505; JS 15]. Conversely, Respondent maintains no break room in Terminal 3, where its janitorial staff and checkpoint agents service its American account; the record does not indicate which of the other three break room options those employees use. [Tr. 35, 297]. Moreover, no employees of any other entity, including the six carriers with which Respondent contracts, use the break rooms which Respondent's employees use. [Tr. 261, 457]. Thus, the weight of the evidence demonstrates that Respondent's employees move freely between the spaces designated for Respondent's use at FLL, regardless of the particular airline they are performing work for at that moment or whether that airline matches the name on the

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"assist" West Jet in securing "counter space" and "all other facilities to provide check-in services for [West Jet's] operation." [JX 17, page 17].

lease. See, e.g., *Air Serv Corporation*, 39 NMB at 453, 456 ((contractor's employees used separate entrances to gain access to distinct but adjacent spaces of the same terminal building than those used by airline employees supported finding of insufficient carrier control). Respondent's Exceptions 36(xxix) through 36(xxxiii) and 52 are without merit and should be rejected.

Unlike the cases in which the NMB determined that contractors were subject to its jurisdiction, Respondent supplies a significant amount of the equipment and supplies used by its employees. The only things furnished by the airlines are: the cabin refreshment supplies specific to each airline, e.g. airsick bags, in-flight magazines, and lavatory amenities (Bahamas, Delta, Spirit, and West Jet); cleaning solutions, sponges, and brushes (Delta, West Jet, and potentially Spirit); and the LAV truck, garbage carts, and garbage tow (Delta). [Tr. 501-502, 505-506, 508; JX 9, page 3; JX 15 (referring to JX 25, Annex A, 3.11.9(b)); JX 17, page 17]. Respondent owns the vacuums and hokys used by the cabin cleaners on Bahamas, Delta, Spirit, and West Jet aircraft, and all janitorial equipment used by its employees. [Tr. 501-502, 505-506; JX 6, page 7]. Respondent is required to provide all equipment necessary for directing and servicing West Jet aircraft at the ramp, including a set of passenger stairs and various pieces of baggage loading equipment. [JX 17, pages 10-11]. It may also be inferred that Respondent utilizes the Delta-furnished LAV truck to satisfy its contractual LAV service obligation to West Jet twice per day, despite Delta's contractual prohibition on the use of Delta-furnished equipment for the provision of services to any other entity. [JX 10, pages 15-16; JX 17, pages 10-11]. There is no evidence in the record suggesting that Respondent also owns its own LAV truck, which the West Jet contract requires it to provide. [JX 17, pages 10-11].

Respondent also furnishes the cleaning supplies used on Bahamas and West Jet aircraft and by its janitorial staff cleaning areas controlled by American, Bahamas, Delta, and West Jet, the gloves used by all of its cabin cleaning (and presumably janitorial) employees, and pays the costs of all of its employees' drug tests – mandated by its own employee handbook – and BCAD security credentialing – required by BCAD for any individual employed at FLL. [Tr. 54, 167-168, 501, 504-506; JX 3, page 6; JX 4, page 6; JX 5, page 6; JX 6, page 7; JX 9, page 3; ]. The ALJ therefore reasonably concluded that there is a lack of significant control by Delta, or any other airline, over the manner in which Respondent conducts its business based on the provision of space, equipment, and supplies. [ALJD 17:17-20]. Respondent's Exceptions 34 and 52 are without merit and should be rejected.

Next, Respondent argues that Delta's and West Jet's requirements that Kendrick attend weekly meetings indicate significant influence over Respondent's operations. Delta requires Kendrick to attend a weekly meeting hosted with all of its business partners and department heads, to address each component of the airline's performance at FLL. [Tr. 499-500]. At the Delta meeting, Kendrick receives only general feedback on Respondent's "KPI" (key performance indicator) scores, drawn from customer satisfaction surveys. [Tr. 499-501]. The record also indicates that the majority of the contact between the managers of Respondents and the airlines happens informally, via telephone or email, and that in-person contact with the other five airlines is approximately once per month or less, as needed. [Tr. 226-227, 229, 289, 303-305, 313-314, 523-524; GCX 8(a); RX 10]. Defrancesco testified that she emails Respondent about its services for American infrequently, perhaps once every few weeks. [Tr. 314]. Respondent's Exception 8 is without merit.

Kendrick also attends a weekly BCAD meeting for all businesses operating at FLL, airlines and contractors alike. [Tr. 496, 498-499]. Thus, although she attends on West Jet's behalf, she would also be present regardless in her capacity as Respondent's station manager. [Tr. 498-499]. There is only one additional portion of the meeting solely for airline representatives, which Kendrick would not have to stay for purely as a representative of Respondent. [Tr. 499]. Respondent's Exception 36(ii) is therefore without merit.

Furthermore, Respondent's Exceptions ignores Respondent's agency in its contract negotiations, in an attempt to paint a portrait of unilateral imposition of terms and conditions of its operations. Instructively, Respondent's Exceptions misrepresents that American, Bahamas, Delta, JetBlue, and Spirit "set forth the applicable holiday or overtime rate and specify which holidays such holiday rate[s] apply to." Respondent's brief at 18. While it is true that Respondent's American, Delta, and JetBlue contracts address holiday rates for the sole service which is billed on an hourly basis (checkpoint), the American and Delta contracts include the same six holidays on which Respondent pays a premium to its employees, per its employee handbook. [JX 3, page 11; JX 4, page 11; JX 5, page 11; JX 8; JX 12, page 5; JX 14, page 5].[9] Individuals employed directly by America, in contrast, are paid holiday premiums on ten holidays. [Tr. 305-306]. Moreover, although Respondent's Delta contract allows Respondent to bill its holiday rate on an additional holiday, Easter, the record is devoid of any evidence showing that Respondent passes this premium on to its checkpoint employee working at the Delta concourse of Terminal 2 on that day. [JX 12, page 5]. To the contrary, according to the employee handbook, Respondent receives additional income simply by having a checkpoint agent work on Easter, as it would on any given Sunday. [JX 3, page 11; JX 4, page 11; JX 5,

[9] Although the JetBlue contract does not specify which days the holiday rates apply to, because it is part of the checkpoint consortium with American, it can be assumed that it is the same six holidays. [JX 14, page 5].

page 11]. Together, these facts demonstrate definitively that Respondent negotiated to receive reimbursement for those holiday premiums. Therefore, there is no evidence that the airlines "dictate" to Respondent whether or on which holidays it will pay holiday premiums to its employees, nor that the airlines establish the rate of pay of any of Respondent's employees, during holidays or at any other time. It is fallacious for Respondent to assert that inclusion of such rates in its contracts is indicative of substantial carrier influence over its operations, and its Exceptions 36(xxxvii), 36(xxxix), 36(lviii), and 36(lxxi) must be rejected.

Additionally, while the Delta contract expressly calls for advance approval of *invoicing* of overtime hours, nothing in the contract requires Respondent to seek Delta's authorization before assigning its own employees to work overtime. [JX 12, page 3; Tr. 576]. Indeed, because the vast majority of Respondent's services for Delta are on a flat fee per service basis, i.e. turn cabin cleaning and LAV service, there is no evidence that Respondent seeks Delta's approval to charge overtime rates with any type of frequency or regularity. [JX 12, pages 2-3].[10] This places Respondent's relationship with Delta at FLL in stark contrast with Kanonn's skycap and wheelchair attendant services – for the same airline, at the same airport – where Kanonn was forbidden by contract from working any of its employees more than 173.33 hours per month. 31 NMB at 414, 417. Moreover, in that case, Delta prepared a blank schedule with slots for each skycap and wheelchair attendant shift, such that Kanonn's sole function in scheduling was placing workers on the template schedule while ensuring none went over the contractual hours limit in a given month. *Id.* Here, only West Jet dictates a minimum staffing level for each departure, and Respondent's designated West Jet workforce is more than double these minimums, despite the fact that West Jet flies on average only two round-trip flights per day

[10] The same is true for the out-of-scope rates set forth in the American, Bahamas, and Spirit contracts. [JX 6, page 2; JX 9, page 3; JX 16].

from Toronto to FLL. [Tr. 513, 518; JS 15, 17; JX 17, page 17]. Respondent is paid a flat fee for each departure, regardless of how many employees it has on duty. [JX 17, page 10]. Respondent's Exceptions 36(xxxvii), 36(xxxviii), 36(xlvi), and 41 must therefore be rejected as being wholly without merit.

Likewise, Respondent retains total discretion for determining what constitutes "sufficient and proper staffing levels" for all other flat fee services, i.e., the total number of employees on duty, the length of their shifts, and the assignment of cabin cleaning staff, janitorial staff, and bag room staff to particular tasks or accounts. [JX 6; JX 9; JX 15, page 2; JX 16; Tr. 216, 284-288, 571]. Respondent also retains discretion as to the length of the shifts of each checkpoint agent on duty in Terminals 1, 2, and 3. [JX 6; JX 9; JX 12-14; Tr. 284-28]. As noted above, many of its employees, particularly in cabin cleaning and janitorial functions, perform services for at least two of Respondent's clients. [Tr. 463, 505; JS 15].

Along the same lines, Respondent also argues that the linkage of its cabin cleaning, ramp, and LAV services to the carriers' flight schedules should lead to a finding of derivative carrier status because the airlines give it access to their flight information systems. This does not indicate any significant level of control over Respondent's employees, whose duty it is to attend to the aircraft once they are stationed at a gate. To the contrary, the use of technology merely helps Respondent dispatch its own employees faster, so that it does not run afoul of the invoice fees the airlines may dock it with if it causes too much delay. Indeed, Spirit and Respondent agreed to change in early 2016 from a system where its supervisors radioed Respondent's supervisors when Spirit flights arrived to placing a dispatcher, employed by Respondent, in Spirit's operations control room so that Respondent would be better able to control its own employees' dispatch to the aircraft. [Tr. 223-225]. The mere fact that the airlines occasionally

assist their contractor so that the contractor will provide better services does not demonstrate control over Respondent's business.

At best, Respondent has three pieces of evidence to support its contention of flight schedule control over its operations: Kendrick's assertion that employees have sometimes had to stay past their scheduled end time to accommodate flight delays, an email from Bahamas reminding Kendrick that peak travel season was approaching and requesting that she ensure adequate staffing to accommodate the full flights, and an email from Delta asking that Respondent's Terminal 2 checkpoint agent begin work at 4:00 a.m. These anecdotal incidents indicate that carriers only occasionally exert any active influence on Respondent's operations. The record is devoid of evidence showing Respondent's employees' work schedules being impacted by the airlines' flight schedules beyond the overall starting time required for each job classification (and, for RON cabin cleaners, the end time), and ensuring that Respondent has sufficient staffing to fulfill their contractual obligations. The ALJ was therefore correct to acknowledge that there is some relationship between the airlines' flight schedules and Respondent's employees' work schedules, while concluding that this relationship is not significant enough to support a finding of carrier control. [ALJD 15:22-31]. Respondent's Exceptions 4, 8, 36(xliv), 36(liii), and 37 through 39 are without merit.

Finally, in other cases, the NMB has considered carrier involvement in budgeting and planning as an indicator of significant control, of which there is no evidence here. Recently, in *ABM-Onsite Services*, 45 NMB at 35, the NMB appeared to place particular weight on the PAC GM's annual involvement not only in renegotiating ABM's contract, but also his in-depth review of ABM's labor costs and other operating expenses while negotiating the cost-plus contract. In contrast, the majority of Respondent's services at FLL are provided on a flat-rate basis,

indicating that Respondent retains significantly more control from a business standpoint over balancing its labor costs, operating overhead, and profit margins. [JX 7, page 12; JX 9, page 2; JX 12, pages 2-3; JX 16; JX 17, page 10]. The record is devoid of any evidence that its expenses are used to justify increases in Respondent's fees, or that the airlines inquire into them. Moreover, although Delta, Spirit, and West Jet may impose fees or penalties on Respondent for causing significant delays or other issues, Respondent is not without recourse under the contracts to contest it. Five of Respondent's six FLL contracts include a clause stating that the non-disputed portion of the invoice will be paid on time, while the parties discuss, arbitrate, or litigate the disputed portion. [JX 6, pages 3-4; JX 9, page 4; JX 10, pages 6-7; JX 17, page 23]. The sixth, the JetBlue contract, merely states that JetBlue will pay invoices on time, less the fees it chooses for insufficient provision of checkpoint services, and that disputes under the contract are to be resolved in the state and federal courts located within the State of New York. [JX 13, pages 3-5 and 14]. Respondent presented no evidence of fees ever having been imposed unilaterally by any airline at FLL, and relies solely on the negotiated fee agreements to assert that the carriers are therefore in substantial control of how Respondent conducts its business.

Overall, the facts of this case demonstrate a distinct lack of carrier control over the manner in which Respondent conducts its business at FLL, and this factor therefore cuts strongly against a finding of derivative carrier status, as correctly found by ALJ Sandron. Respondent's Exceptions 36(xx), 36(xxxv), 36(xxxvi), 36(lvi), and 36(lxx) are without merit and should be rejected by the Board.

*b.* *The ALJ Appropriately Considered the Degree of Carriers' Access to Respondent's Operations and Records. Respondent's Exceptions 35 and some parts of 36 are Without Merit.*

It is undisputed that most of the carrier contracts include reservations that permit the carriers to inspect Respondent's records relating to the provision of services pursuant to those

contracts, although no such reservation is included in the Bahamas service agreement. [JX 9]. There is no evidence in the record of any airline requesting to inspect Respondent's records. West Jet conducts audits of its own payment systems used by Respondent's employees. [RX 3, pages 6-8].

Similarly, while the carriers also have the contractual right to physically inspect Respondent's space at FLL used to perform services on their behalf, there is no evidence that they have ever done so. In fact, there is no evidence that employees or managers of the airlines are ever physically present in the Respondent-controlled spaces of the break rooms. [Tr. 261].

Nonetheless, on balance, this factor weighs slightly in favor of derivative carrier status, based on NMB precedent according weight to the contractual retention of inspection rights. See, e.g., *ABM-Onsite Services*, 45 NMB at 35. It was appropriately considered by the ALJ, and correctly found not to tip the scales in favor of carrier control in light of the lack of evidence presented on the other factors. [ALJD 17:24, 17:31-33]. Respondent's Exceptions 35, 36(v), 36(xiv) 36(xxii), 36(xxiii), 36(xl), 36(lxi), 36(lxix) are therefore unnecessary and without merit.

*c.* *The ALJ Correctly Concluded that the Degree of Carriers' Role in Respondent's Personnel Decisions is Insufficient. Respondent's Exceptions 9, 12-14, 15(ii), 17-19, 37, and 43-48 are Without Merit.*

There is no record evidence that Respondent has ever had to seek approval from any airline to give a pay raise to its employees or to hire additional staff, as was the case in both *ABM-Onsite Services*, 45 NMB 27 (2018), and *Kanonn Serv. Enterprises Corp.*, 31 NMB 409 (2004). Nor is there any record evidence showing that, at the direct request of any airline, Respondent selects applicants to interview; chooses which applicants to hire; decides which position to assign new hires to; schedules particular employees for particular shifts; expands its

workforce; promotes, demotes, suspends, or discharges its employees; or issues discipline to its employees. [Tr. 222-223, 267, 288-292, 352].

Respondent's contention of significant carrier indirect input into major personnel decisions, already barely supported by sparse evidence, is further undercut by the actual circumstances of each situation it cites. For instance, although Kendrick decided to hire a Delta employee that Delta had recommended for an open LAV truck operator position, Respondent's Exceptions omit the fact that Kendrick solicited this input from Delta, and was under no obligation either to do so, or to follow it. [Tr. 557-558; JX 10, pages 2-6]. Similarly, when a supervisory role on the Bahamas ramp became available, Kendrick recalled the opinion voiced by a Bahamas supervisor that it would be good to keep a particular employee on the account; Kendrick chose to promote him. [Tr. 559-560]. The evidence shows that in both cases, the airlines did not dictate the action to be taken. Rather, Kendrick made a business decision that pleasing Respondent's clients would be beneficial for Respondent. In contrast, ABM was required to obtain approval for all hires from the PAC's GM, and he was also expressly in charge of selecting ABM's new facilities manager, the person he would work most closely with, and even dictated what her schedule would be so that it would match his. *ABM-Onsite Services*, 41 NMB at 35. In the instant case, any influence that was held over the personnel decisions by the carriers was voluntarily yielded by Respondent, and is not indicative of "significant influence." The ALJ was correct to conclude that these incidents did not support a finding of meaningful carrier influence over Respondent's personnel decisions. [ALJD 16:25-31]. Respondent's Exception 19 is plainly without merit and should be rejected.

Respondent also argues that the discipline which it issued following receipt of customer complaints about particular employees also indicates significant influence by the carriers on its

personnel decisions. However, both American's station manager, Defrancesco, and Spirit's operations manager, Rose, denied telling Respondent what to do about the problems they were reporting, as well as ever requesting that Respondent remove an employee from their account. [Tr. 225, 227, 291]. The NMB has previously found the lack of direction to take specific action when reporting an incident persuasive, where the contractor took the report and determined what action to take without further carrier input. See, e.g., *Air Serv Corporation*, 39 NMB at 457.

Illustratively, Defrancesco's email to Respondent's operations manager, Mike Oviedo (Oviedo) regarding unprofessional behavior by Hermogenes Antonio Vasquez Ramos (Vasquez) simply asked that Respondent "plz [please] talk to Tony," and she testified that she expects that Respondent will do its own "due diligence" with respect to its own employees. [RX 2; Tr. 315]. Oviedo and Kendrick conducted an investigative meeting with Vasquez, and then made the independent determination that the appropriate response to his conduct was suspension. [Tr. 69-70, 314-315]. Likewise, as noted above, Respondent's decision to remove the night dispatcher from the Spirit account was a solution of its own choosing to the performance issues identified by Rose in emails to Kendrick. [Tr. 223-225]. Respondent's Exceptions 9 and 17 are without merit and should be rejected.

The record reflects only four instances of carriers making direct, explicit requests to remove employees from their service. First, when Bahamas requested that Respondent remove an employee from the bag room following several unexcused absences, Kendrick investigated further and determined that the employee had been tardy or absent every Saturday for several months, and decided to terminate his employment. [Tr. 565; RX 3, page 1]. In a similar vein, when West Jet conducted an audit of its payment system, used by Respondent's passenger service agent employees to transact West Jet's business, it discovered that three employees'

"cash void transactions" were too high for its comfort, and requested that all three be removed from its account. [RX 3, pages 6-8; Tr. 540-541]. Kendrick and admitted in her testimony that it was Respondent's decision to terminate their employment altogether. [RX 3, pages 6-8; Tr. 540-541, 566-567]. Third, when West Jet reported to Kendrick that one of Respondent's employees was incorrectly using its electronic baggage handling system for the second time, Kendrick may or may not have been asked to remove him from the account. [RX 3, page 3; Tr. 565-567]. The employee then voluntarily resigned his employment to accept other work and because of a lack or loss of transportation. [RX 3, page 3]. Finally, Respondent transferred an employee to another account following a complaint of unprofessional behavior from Bahamas. [Tr. 528-529; RX 11]. In all of these situations, it is clear that all personnel decisions made subsequent to the carrier's request to remove an employee from their account were Respondent's own to make. Thus, Respondent's Exceptions 12 through 14, 15(ii), 18, 43, and 44 are without merit, and the Board should deny them.

Furthermore, Respondent's offering of alternate work on other airlines' accounts to several employees undermines the power of the "removal" right in the instant analysis. [Tr. 528-529; GCX 8(a); RX 3, pages 2 and 4]. Unlike in other cases where the contractor has a single client at the location, a request to remove a particular employee from one of Respondent's FLL accounts is not an effective discharge. See, e.g., *ABM-Onsite Services*, 45 NMB at 35; see also *Signature Flight Support*, 32 NMB at 222 (although client requests regarding personnel changes were accommodated as operationally appropriate, requests that particular employees not work on a specific account were not indicative of carrier control, because the employees could be transferred to other accounts), but c.f. *Complete Skycap Services, Inc.*, 31 NMB 1, 2-3 (2003) (wheelchair attendants provided for 18 airlines and request for removal from one airline account

supported finding of "sufficient" control, where airlines also consulted with contractor regarding number of employees hired, hours worked, and overtime and holiday work schedules). Respondent's Exception 45 is without merit and should be rejected.

In sum, although there is evidence that airlines have reported performance issues to Respondent, which resulted in discipline or discharge, the record reflects that each of those decisions resulted from Respondent's own determination regarding the proper course of action. The same is true of the instances where Kendrick voluntarily took into account carrier input to hire one employee and promote another. Respondent retains substantial independent judgment not seen over personnel decisions in cases where the NMB has found derivative carrier status, such as *ABM-Onsite Services*, 45 NMB at 35-36, and *Air Serv Corp.*, 38 NMB 113, 118-121 (2011). Thus, the ALJ was correct in finding that the limited evidence presented by Respondent was insufficient to demonstrate the requisite carrier control over its personnel decisions, and Respondent's Exceptions 37 and 46 through 48 are without merit.

*d.* *The ALJ Appropriately Concluded that the Degree of Supervision Exercised by Carriers Over Respondent's Employees Fails to Demonstrate Meaningful Control. Respondent's Exceptions 4, 7, 20, 21, 37, 48, and several parts of 36 are Without Merit.*

It is undisputed that Respondent's employees are not directly supervised by carrier supervisors at FLL. As described in detail above, only Respondent's supervisors conduct interviews of applicants; determine how many and which employees will work, and for how long their shifts will be; issue discipline to Respondent's employees; and have authority to suspend or discharge Respondent's employees. All of Respondent's employees report to a supervisor of Respondent in the daily course of their work; many, such as the RON cabin cleaners and West Jet account employees, never see or even interact with employees of the airline to which they are

assigned. [Tr. 216, 259-260, 288-289, 293, 576]. Defrancesco and Rose confirmed that supervisors of their airlines do not direct the work of Respondent's employees. [Tr. 216, 289].

Respondent's supervisors alone generate and publish work schedules for all of Respondent's employees. [JS 16]. Although Respondent's cabin cleaning, checkpoint, bag room, and passenger service operations are related to the airlines' flight schedules, Respondent makes its own choices about the best methodology to accommodate staffing needs, including permanent changes and seasonal fluctuations. For example, when Bahamas emailed Kendrick to remind her of the airline's peak season and the need for adequate manpower, Bahamas did not specify how much manpower would be required or direct Respondent to fulfill the need in any particular way. [RX 10]. Thus, Kendrick determined that the best option for Respondent's business would be to "shuffle" the schedules of the current employees, rather than hire additional staff, to provide "double" the manpower. [Tr. 519-520].

Conversely, in *Air Serv Corporation*, 38 NMB at 118, the NMB found sufficient carrier control in part because airlines specified numbers of employees and hours of coverage to be provided, and modified individual employees' schedules "as they [chose]." In *Kanonn Serv. Enterprises Corp.*, 31 NMB at 414, Delta had a direct impact on Kanonn's business operations and personnel decisions, by setting forth a schedule dictating the number of employees needed to work particular shifts.

Here, Respondent has the discretion to determine the number of employees required to perform the turn and RON cabin cleanings on Delta and Spirit's aircraft, and chooses to dispatch cleaners from the other accounts to perform turn cleanings on West Jet and Bahamas aircraft instead of employing staff dedicated to those accounts. [JS 15; Tr. 216, 463, 494, 505; JX 10-12]. Likewise, Respondent determines the number of staff needed to perform the janitorial

services required for American, Bahamas, and West Jet. At one time, Respondent tasked Spirit account RON cabin cleaners to assist with cleaning Delta RON aircraft after they had finished their normal duties. [Tr. 257]. Respondent later decided to hire additional RON cabin cleaners and designate them to the Delta account. [Tr. 257]. The record is devoid of any evidence showing that Delta or Spirit influenced this decision in any way.

Respondent receives no formal auditing or feedback of its janitorial service or checkpoint performance from American or JetBlue, although Respondent contends that about once per month, airline supervisors may "observe" the checkpoint agents on duty. [Tr. 293, 303-304, 523]. Notably, the American contract includes a form called a "Janitorial Quality Inspection Sheet," which Defrancesco testified that she has never used in over six years overseeing American's operations at FLL. [Tr. 303-304; JX 7].

Respondent also receives far less personal and detailed feedback about its employees' individual performances than contractors have in previous NMB cases. For example, while Delta managers and Kanonn supervisors maintained frequent personal communication throughout the work day about individual wheelchair attendants and skycaps, Respondent's feedback about its cabin cleaning employees is typically limited to data collated from responses from Delta's customer surveys and Spirit's Q-Pulse rating results logged by Spirit ramp supervisors, making it difficult, if not impossible, to identify a particular employee's deficient or exceptional performance. *Kanonn Service Enterprises Corporation*, 31 NMB at 417. Spirit operations manager Rose only meets with Kendrick about once per month, and then only to address Respondent's overall performance. [Tr. 226]. Defrancesco does not regularly meet with Kendrick at any interval. [Tr. 313-314].

Therefore, this factor cuts against a finding of significant carrier influence control, and, by extension, derivative carrier status, as the ALJ correctly found. Respondent's Exceptions 4, 7 (to the extent it regards Bahamas) 20, 21, 36(v), 36(xliv), 36(lxi), 37, and 48 should be rejected, as they are meritless.

*e. The ALJ Appropriately Considered the Degree of Carriers' Control Over Training of Respondent's Employees. Respondent's Exceptions 22, 23, 25, 26, 31, 50, 51, and several subparts of 36 are Without Merit.*

The majority of Respondent's employees at FLL are subject to either Delta, Spirit, or West Jet computer-based training requirements, and must renew that training on a periodic basis. [JX 10, pages 3-4; JX 17, page 14; RX 5, 6; Tr. 227-228, 241-242, 270, 352]. The fourteen West Jet passenger service agents are also subject to additional on-the-job training and airport security training mandated by TSA. [Tr. 450-451].[11] On the other hand, Respondent's contract with Bahamas is silent on the issue of training, and no training is specified by either American or JetBlue, other than that Respondent's employees be trained to perform their janitorial and checkpoint agent duties. [JX 6, page 19; JX 7, page 4; JX 9; JX 13, page 12; Tr. 452, 467]. Defrancesco specified that there was no training required by American for the janitorial and checkpoint employees working on their account, regardless of the contract's mandate. [Tr. 299]. Besides Bahamas, the other five airlines simply require Respondent to supply a competent and trained workforce. [JX 6, page 19; JX 7, page 4; JX 10, page 3; JX 13, page 12; JX 15, page 6; JX 17, page 14]. Although Respondent discharged two employees who could not successfully complete the West Jet training path, at least one was offered a transfer to another account at FLL. [RX 3, pages 4-5]. The record does not reflect any other instances of employees failing carrier-

[11] Counsel for the General Counsel does not contest that the ALJ omitted a summary of the facts regarding West Jet's training requirements in his findings. [ALJD 7:28-8:20]. However, Counsel for the General Counsel opposes Respondent's Exception 36(iii)-(viii) and 36(x)-(xi) to the extent that it is not necessary for those extensive details to have been included in the ALJD to reach the same outcome, for the reasons set forth throughout this section and the previous section addressing, generally, Respondent's Exceptions to the ALJ's factual summaries.

specific training. Respondent's Exceptions 36(iv) and 36(v) are without merit, as they do not materially affect the outcome of this case, and should be soundly rejected.

Respondent utilizes its own training program to train its ramp employees working on the Bahamas account. [Tr. 463-464]. Bahamas signed off on this program, because Respondent said, effectively, "we will not touch your aircraft until we [have] a training platform." [Tr. 462]. Respondent also conducts additional on-the-job training for its employees working on the Bahamas ramp. [Tr. 462-464]. Bahamas does not require any Bahamas-specific training for Respondent's cabin cleaners working on its account. [Tr. 463]. Respondent uses its own 900-page training manual as the basis for training the checkpoint agents and janitorial employees, approximately 16% of Respondent's FLL workforce. [Tr. 472-474; JS 15]. Respondent's Exceptions 22, 23, 25, 31, and 36(lxiii) are without merit and should be rejected.

The ALJ did not err by omitting the excerpts from Delta's cabin cleaner training path sought by Respondent from the decision. At most, that training takes four hours to complete. [Tr. 435-436]. Moreover, Respondent's Spirit account cabin cleaning employees use a computer-based training provided by Spirit that lasts only 15 to 20 minutes. [Tr. 352]. This falls far short of the three-week training program used by ABM to train all of its employees at the behest of the PAC, used to support the NMB's recent finding of RLA jurisdiction due to effective exercise of significant carrier influence in *ABM-Onsite Services*, 45 NMB at 35. Inclusion of these minutiae would not materially affect the outcome of this case. Respondent's Exception 26 should be rejected.

Nor did the ALJ err by finding as a matter of fact that much of the training required of Respondent's cabin cleaning, ramp level, and passenger service employees is required by TSA and other government agencies, per the testimony of Respondent's Director of Corporate Safety

and Compliance. [ALJD 8:6-10; Tr. 439-440]. It is common knowledge that the airline industry is heavily regulated, by both TSA and the FAA. The record also includes evidence that the USDA and EPA regulate the disposal of aircraft waste. [Tr. 431, 444, JX 28]. It was therefore reasonable for ALJ Sandron to infer that, despite the safety officer's hesitance to commit to a firm estimate of the percentage of government-mandated content included in Delta's training modules, his initial assessment of 60% was a reasonable approximation. Respondent's Exception 30 is therefore without merit, and should be denied.

Respondent's citation to *Globe Aviation Services*, 334 NLRB 278 (2001), does not support reversing the ALJ's corresponding legal conclusion, that training that would be the same regardless of the airline – because it is mandated by the government – cannot establish carrier control within the meaning of the RLA. [ALJD 17:7-15]. In deciding *Globe Aviation Services*, the Board relied on findings and conclusions in the advisory opinion issued by the NMB in the same case. 28 NMB 41 (2000). However, Respondent's reliance on *Globe Aviation Services* in either form is misplaced, as it has been superseded by *Aero Port Services*, 40 NMB 139, 143 (2013), and *Airway Cleaners, LLC*, 41 NMB 262, 268 (2014), the authority cited by the ALJ. The NLRB applies current NMB precedent when determining whether the facts of a particular case warrant a referral to the NMB for an advisory opinion or, as is the case here, the facts readily show that NLRB jurisdiction is appropriate. Therefore, it was not error for the ALJ to cite those cases and determine that the significance of the carriers' influence over Respondent's training of its employees is undercut by the regulated nature of the industry. Likewise, it was not error for the ALJ to determine that this factor cuts against a finding of carrier control under the circumstances demonstrated by the record. Respondent's Exceptions 50 and 51 should be rejected.

*f.* *The ALJ Correctly Concluded that the Extent to Which Respondent's Employees are Held Out to the Public as Carrier Employees is Insufficient. Respondent's Exceptions 33, 36(lxvii), and 53 are Without Merit.*

The vast majority of Respondent's employees wear uniforms issued by Respondent, bearing only Respondent's name and logo. [Tr. 262-265, 507-508; GCX 16]. West Jet requires only that Respondent's 14 employees serving in passenger assistance roles (i.e. ticket counter and gate agents) wear West Jet uniforms and name tags. [RX 7; JX 17, pages 14-15; Tr. 507-508]. Notably, there are only four West Jet flights in and out of FLL (two turns) each day. [Tr. 513, 518]. Other employees visible to the traveling public, such as turn cabin cleaners – including those cleaning West Jet aircraft – wear no airline insignia at all. [GCX 16; Tr. 265, 507-508].

Additionally, all employees of Respondent wear a BCAD-issued security credential/access card showing Respondent's name; these credentials do not indicate which airline(s) Respondent's employees service, and access is not restricted by terminal based on employees' account assignments. [Tr. 32-33, 46, 92, 166; GCX 7(c); GCX 14; JX 22, page 4]. Respondent pays for its employees to get their initial badge, and renewal badges at six months, one year, two years, and every two years thereafter. [Tr. 54, 167-168].

Although NMB precedent cites contractual grooming standards as a factor supportive of a finding of sufficient carrier control, here, Respondent's own employee handbook also includes detailed grooming guidelines, such that those "imposed" by its airline clients are irrelevant. For example, the "Appearance Standards" in Respondent's handbook state:

> All employees are required to be neat, clean, presentable, and to wear the prescribed uniform issued by the Company. Torn or badly soiled uniforms must be replaced if they cannot be returned to an acceptable condition as determined by Company management.

[JX 3, page 19; JX 4, page 19; JX 5, page 19]. The handbook goes on to describe restrictions on hair, jewelry, and footwear that may be worn by both male and female employees, including the color of hose permitted to public-facing female employees. [JX 3, pages 19-20; JX 4, page 19-20; JX 5, page 19-20]. In the face of these strictures, the generalized contractual requirements that Respondent's employees' appearances "give the general public the best impression" of the airline add nothing to the employees' working conditions, or to Respondent's burden as a contractor.

The record is devoid of any evidence of an airline customer at FLL instructing Respondent to improve its employees' appearance in any manner, and therefore cannot support a finding of derivative carrier status based on how the vast majority of Respondent's employees are held out to the public. The ALJ was correct to find that this factor does not indicate significant carrier influence, and the Board should reject Respondent's Exceptions 33, 36(lxvii), and 53 and adopt the ALJ's sound factual finding and conclusions of law on this point.

*g.* *The Totality of the Facts Show that Respondent is not a Derivative Carrier, and that the ALJ's Conclusion was Sound. Respondent's Exceptions 54 and 56-58 are Without Merit.*

On the totality of these facts, the record plainly demonstrates that Respondent is an independent business operator, subject to very limited control by the airlines over just a few elements of its FLL operations. At each turn, any factor that appears to turn the tide towards significant carrier influence is ultimately undercut by a cross-current of the practical reality of Respondent's operations. For example, notwithstanding that Respondent's West Jet contract includes minimum staffing requirements, Respondent appears to exceed them based on the number of employees employed in those classifications. [JX 17, page 17; JS 15]. As Respondent is paid by West Jet on a flat fee basis, this is even further indicative of Respondent's independence; Respondent bears the weight of its labor costs alone. Meanwhile, although

Respondent is compensated by the airlines on an hourly basis for the work performed by its checkpoint agents, the rates established by the contracts merely represent a ceiling on what Respondent may pay its employees. The record does not establish either that Respondent has been unable to implement a wage increase without raising the rates it charges the airlines, or that Respondent has had to obtain approval for wage increases for checkpoint agents (or any other employees), as has happened in other cases the NMB has previously examined. See, e.g. *ABM-Onsite Services*, 45 NMB at 35.

As described above, the carriers do not effectively exert significant influence over the manner in which Respondent conducts its business, its personnel decisions, the supervision of its employees, or how more than 90% of Respondent's employees are presented to the public. The carriers – except Bahamas – reserve the right to examine Respondent's records related to its provision of services, although there is no evidence of any ever having done so. Respondent's training of its employees in cabin cleaning, LAV, and passenger service roles is under heavy influence by the airlines, but is also mandated in large part by the federal government. Respondent also imposed its own training program for its ramp agents working on the Bahamas account when Bahamas did not maintain one of their own. Furthermore, Respondent is solely responsible for any training given to its 19-person janitorial staff, and its 12 checkpoint agents and supervisors.

In the final analysis, therefore, Respondent's FLL operations do not exhibit significant carrier control as required by the NMB's six-factor inquiry. Accordingly, the ALJ was correct to find thus, and to conclude that Respondent is subject to the jurisdiction of the NLRA, not a derivative carrier under the RLA. The Board should adopt his factual findings and conclusions

of law, and order all appropriate remedies for Respondent's violations of the Act. Respondent's Exceptions 54 and 56 through 58 should be denied forthwith.

### *iii. Referral to the NMB for an advisory opinion on Respondent's claim of derivative carrier status is unnecessary on the facts of this case.*

While the NLRB has historically had a general policy of referring questions regarding RLA jurisdiction to the NMB, "there is no statutory requirement" that the jurisdiction question be submitted for an NMB advisory opinion prior to a Board ruling. *Dobbs Houses, Inc. v. NLRB*, 443 F.2d 1066, 1072 (6th Cir. 1971). The Board retains jurisdiction in cases where RLA jurisdiction is clearly lacking, and has not referred to the NMB cases with similar factual situations to those where the NMB has previously declined jurisdiction. *E.W. Wiggins Airways*, 210 NLRB 996 (1974); *Air California*, 170 NLRB 18 (1968). The Board follows NMB precedent to decide the jurisdictional question if it is raised by either party, but the Board determines that it is not necessary to refer the issue to the NMB for an advisory opinion.

As set forth in detail above, the facts of this case are readily distinguishable from those where the NMB has asserted jurisdiction. Using the standard articulated by the NMB in *ABM-Onsite Services*, 45 NMB at 34-35 (2018), that there must be evidence of "significant influence" across the totality of the six factor inquiry into carrier control, the Board should conclude that Respondent is not a derivative carrier. The strongest factor in Respondent's favor, training, is insufficient to outweigh the evidence permeating the record that Respondent makes independent decisions about nearly every facet of its business, and is not dictated to by the airlines at FLL. The Board does not need to refer this case to the NMB, as it bears little factual resemblance to the entwined relationships of true derivative carriers and their airline customers.

## III. CONCLUSION

Counsel for the General Counsel respectfully urges that the Board deny all of Respondent's Exceptions, except on the limited basis as set forth above, and adopt the ALJ's correct conclusion that Respondent is an "employer" within the meaning of the NLRA. Counsel for the General Counsel also respectfully urges the Board to adopt the full range of remedies set forth in the Order and Notice to Employees recommended by ALJ Sandron. Finally, Counsel for the General Counsel further seeks any other relief the Board determines to be appropriate to remedy Respondent's unlawful conduct.

Dated: May 2, 2018.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, Brief in Support of Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision and Recommended Order, was served on May 2, 2018 as follows:

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